



Wednesday, February 28, 2007

## **H.R. 566 - National Security Foreign Investment Reform and Strengthened Transparency Act of 2007**

### **Floor Situation**

The National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 (H.R. 556) is being considered on the floor under a modified open rule. This legislation was introduced by Representative Carolyn Maloney (D-NY) on January 18, 2007, and was ordered to be reported as amended from the Committee on Financial Services, by voice vote, on February 14, 2007.

During the mark-up of H.R. 556, Representative Tom Price (R-GA) offered an amendment to the manager's amendment, which required the President to approve and sign any review or investigation of a transaction that includes a person from a nation that has been designated as a state sponsor of terrorism by the Department of State. The Price (GA) amendment was adopted by a recorded vote of 40 to 29.

H.R. 556 is expected to be considered on the floor of the House of Representatives under a modified open rule on February 28, 2007.

The modified open rule:

- Provides one hour of debate equally divided and controlled by the Chairman and the Ranking Minority Member of the Committee on Financial Services.
- Waives all points of order against consideration of the bill except for clauses 9 (earmark disclosure requirement) and 10 (PAYGO) of Rule XXI.
- Makes in order only those amendments to the amendment in the nature of a substitute that are pre-printed in the *Congressional Record* or are pro forma amendments for the purpose of debate.
- Provides that each amendment printed in the *Congressional Record* may be offered only by the Member who caused it to be printed or a designee, and that each amendment shall be considered as read.
- Provides one motion to recommit with or without instructions.

*\*Note: In the 109<sup>th</sup> Congress, Representative Roy Blunt (R-MO) introduced similar legislation, the National Security Foreign Investment Reform and Strengthened Transparency Act of 2006 (H.R. 5337), which passed the House of Representatives by a recorded vote of 424 to 0 on July 26, 2006 ([Roll Call Vote 404](#)). This legislation was substantially identical to H.R. 556.*

*The Senate passed the Foreign Investment and National Security Act of 2006 (S. 3549), introduced by Senator Richard Shelby, on July 26, 2006 by unanimous consent.*

## **Background**

### Establishment of CFIUS

On May 7, 1975, President Ford issued Executive Order 11858, which established the Committee on Foreign Investment in the United States (CFIUS). CFIUS was responsible for having “primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment.” This included analyzing trends of foreign investments in the United States, providing guidance on major foreign governmental investments, reviewing investments that may impact our “national interests,” and considering proposal for new legislation or regulations relating to foreign investment.

CFIUS was originally formed with six cabinet level members and chaired by the Secretary of the Treasury.

*\*Note: Today (as a result of multiple executive orders), CFIUS has twelve members: Secretary of the Treasury (chairperson), Secretary of State, Secretary of Defense, Secretary of Commerce, Secretary of Homeland Security, United States Trade Representative, Chairman of the Council of Economic Advisors, Attorney General, Director of the Office of Management and Budget, Director of the Office of Science and Technology Policy, Assistant to the President for National Security Affairs, and the Assistant to the President for Economic Affairs.*

### Exon-Florio Provision

The role of CFIUS was largely expanded after passage of the Exon-Florio amendment to the Defense Production Act of 1988, which was signed into law as part of the Omnibus Trade Act (PL 100-418). This provision allows for a review of transactions of foreign companies within the United States and provides the President with the authority to suspend or terminate the transactions if they are deemed to pose a national security risk.

Upon notification of a transaction (which is voluntary), the Exon-Florio provision requires a 30 day review in order to determine whether an investigation is needed. If it is determined that an investigation is necessary, the provision allows for 45 days to report findings to the President. The President then has 15 days to act on those recommendations.

*\*Note: According to the Department of the Treasury, CFIUS has reviewed over 1700 acquisitions of companies by foreign entities since the enactment of the Exon-Florio provision.*

The Exon-Florio provision provided the President with several factors he may consider in determining the national security implications of a specific transaction:

- Domestic production needed for projected national defense requirements;
- The capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- The control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;
- The potential effects of the proposed or pending transaction on the sales of military goods, equipment, or technology to any country that has been designated by the Secretary of State (under the Export Administration Act): as a country that supports terrorism, as a country of concern regarding missile proliferation, as a country of concern regarding the proliferation of chemical and biological weapons or is listed on the “Nuclear Non-Proliferation Special Country List”; and,
- The potential effects of the proposed or pending transaction on U.S. international technological leadership in areas affecting U.S. national security.

*\*Note: The Exon-Florio provision does not require the President to use these factors. H.R. 556 (as described below) requires consideration of these factors and adds additional factors.*

The President is able to exercise his authority to suspend or terminate a transaction (provided by the Exon-Florio provision) under two conditions:

- There is credible evidence that the foreign interest exercising control might take actions that threatens to impair the national security, and
- Current provisions of law (other than the International Emergency Economic Powers Act), do not provide adequate and appropriate authority to protect the national security in the matter before the President.

*\*Note: CFIUS was provided with the authority to implement Exon-Florio upon President Reagan’s issuance of Executive Order 12661 on December 27, 1988. CFIUS is not yet established by statutory authority. H.R. 556 establishes CFIUS in statute.*

### Byrd Amendment

Section 837 of the National Defense Authorization Act of 1993 (PL 102-484), known as the “Byrd Amendment,” requires CFIUS to investigate a transaction of a foreign company within the United States when “an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.”

### Dubai World Ports Transaction

Significant concerns over the CFIUS process arose in 2006 when Dubai Ports World purchased P & O Ports’ commercial operations, which included six U.S. ports. Upon learning of the acquisition, many Members of Congress expressed concerns over the lack of Congress’ ability to perform oversight over the CFIUS process and the overall transparency of the foreign investment process.

The Emergency Supplemental Bill for Afghanistan, Iraq and Katrina (H.R. 4939) included an amendment adopted in the House Appropriations Committee that restricted funding for any acquisition by Dubai Ports World. The day after the amendment was adopted in the Committee, Dubai Ports World announced that they were going to sell the port operations they had acquired. H.R. 4939, including the amendment language, passed the full House of Representatives on March 16, 2006, by a vote of 377 to 38 ([Roll Call Vote 65](#)).

### **Summary**

The National Security Foreign Investment Reform and Strengthened Transparency Act of 2007 (H.R. 556) includes the following provisions:

#### Review and Investigations Process (Section 2)

- Requires CFIUS to review any covered transaction upon notification of such transaction by any party involved in the transaction.

*\*Note: Covered transaction is defined as: “any merger, acquisition, or takeover by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.”*

Additionally, the President or any CFIUS member acting on behalf of CFIUS can initiate a review of any covered transaction and any previously reviewed or investigated covered transaction if false information was originally submitted or if a party to the transaction breaches a mitigation agreement or condition.

*\*Note: Authority to initiate a review can only be delegated to a deputy secretary or appropriate under secretary.*

The review must be completed within 30 days of notification of the transaction or within 30 days of initiation of a review by the President.

➤ Requires an investigation to be conducted if:

- A review determines that “the transaction threatens to impair the national security of the United States and that threat has not been mitigated during or prior to the review of a covered transaction” or “the transaction is a foreign government-controlled transaction;”

*\*Note: This provision reaffirms the “Byrd Amendment” (described above)*

- A roll call vote results in at least one vote by a committee member disapproving of the transaction; or,
- The Director of National Intelligence (DNI), through a thorough analysis, identifies “particularly complex intelligence concerns that could threaten to impair the national security of the United States and CFIUS members were not able to develop and agree upon measures to mitigate satisfactorily those threats during the initial review period;”

*\*Note: The DNI is provided with “adequate time” in order to complete the appropriate review. This is different from the introduced version of the bill, which allowed for a minimum of 30 days. The DNI is not a member of CFIUS and plays no policy role other than providing the analysis to CFIUS.*

- Requires investigations by CFIUS to be completed within 45 days. The President or CFIUS (by a 2/3 vote) can extend that period by no more than 45 days.
- Establishes that any review or investigation must be approved by a majority of CFIUS members and signed by the Secretary of the Treasury, Secretary of Homeland Security and Secretary of Commerce (or a deputy secretary / appropriate under secretary).

*\*Note: If any member of CFIUS votes against approving a transaction, the investigation report must also be signed by the President*

### Establishment of CFIUS (Section 3)

- Establishes that CFIUS shall be comprised of: Secretary of the Treasury (Chairperson), Secretary of Homeland Security (Vice Chairperson), Secretary of Commerce (Vice Chairperson), Secretary of Defense, Secretary of State, Attorney General, Secretary of Energy, Chairman of the Council of Economic Advisors, United States Trade Representative, Director of National Economic Council,

Director of the Office of Science and Technology Policy, and the President's Assistant for National Security Affairs.

*\*Note: The President may designate additional members from the Executive Office of the President and the Chairperson may involve additional heads of federal departments as appropriate.*

- Allows the President or Chairperson to organize meetings.
- Authorizes appropriations of \$10 million for fiscal years 2008, 2009, 2010, and 2011 in order for CFIUS to carry out its business.

#### Additional Factors to be Considered (Section 4)

- This section requires all of the factors of the Exon-Florio provision (described above) to be considered when reviewing or investigating a transaction and includes the following new factors:
  - Whether the covered transaction has a security-related impact on critical infrastructure in the United States;
  - Whether the covered transaction is a foreign government controlled transaction; and,
  - Such other factors as the President or the President's designee may determine to be appropriate, generally or in connection with a specific review or investigation.

#### Non-waiver of Sovereign Immunity (Section 5)

- Removes liability from the United States for any losses or expenses incurred by any party to a covered transaction after a transaction has been consummated if the party didn't provide written notification to CFIUS or did not wait for the review or investigation to be completed.

#### Mitigation, Tracking and Post-Consummation Monitoring and Enforcement (Section 6)

- Authorizes CFIUS or designated federal agency to negotiate or enter into any condition or agreement with any party of a covered transaction in order to mitigate threats to our national security upon completion of a risk-based analysis.
- Establishes procedures for withdrawn notices, including timetables for resubmission, interim protections to address concerns of a transaction, and a process for tracking the activities of a party to a transaction prior to resubmission.

*\*Note: CFIUS is responsible for designating at least one federal agency to negotiate, modify or monitor any agreements or conditions imposed by the CFIUS. This agency is responsible for providing periodic reports to the CFIUS and reporting any significant modifications in agreements to the DNI.*

#### Increased Oversight by Congress (Section 7)

- Requires CFIUS to report to Congress within 5 days of the completion of any investigation of a covered transaction or after the President has taken any action under his authority (provided in Section 2). The report must include CFIUS' findings, determination on whether to take any action, and the factor considered by CFIUS.
- Requires that the reports must be provided to the Minority and Majority Leader of the Senate, the Speaker and Minority Leader of the House of Representatives, and to any House and Senate committees with jurisdiction over any portion of the transaction. A classified briefing shall be provided to the House and Senate upon request.
- Requires CFIUS to provide an annual report to all appropriate committees of jurisdiction in the House and Senate about the reviews and investigations of covered transactions completed each year, including an evaluation of whether there is a coordinated strategy to acquire U.S. companies involved in the production of critical technologies and an evaluation of whether there are industrial espionage activities that involve foreign governments. The report is required to be filed by July 31 each year. A separate, classified, version may also be filed.

*\*Note: This annual report includes all of the elements of a quadrennial report required to be filed by CFIUS with Congress beginning in 1992, only one of which had been filed until January of this year. Additional factors are added to the report beyond those required in the quadrennial report.*

- A separate report requires studies of investments in the United States by foreign governments or their entities that comply with any boycott of Israel or those that do not ban foreign terrorist organizations (designated by the Secretary of State). Additionally, this section requires a report by the Secretary of the Treasury providing an analysis of the study and the effects of such foreign investment on our national security.

#### Certification of Notices and Assurances (Section 8)

- Requires a written statement (along with the notification of a covered transaction) certifying that the information provided is accurate and fully complies with the appropriate requirements.

### **CBO Estimate**

The Congressional Budget Office projects the cost of HR 556 to be \$40 million over the 2008-2012 period, in addition to an undetermined increase in administrative expenses of some federal agencies.

### **Summaries of Amendments Preprinted in the Congressional Record**

(Please contact offices of amendment sponsors for additional summaries, information or copies of the amendment)

**Rep. Blunt (R-MO)** may offer an amendment (#1) on February 28, 2007. The amendment is the identical text of H.R. 556 as introduced.

**Rep. Blunt (R-MO)** may offer an amendment (#2) on February 28, 2007. The amendment is the text of H.R. 556 as reported in addition to the Frank manager's amendment and a restatement of the confidentiality requirements in current law.

*\*Note: Mr. Blunt only intends to offer an amendment in the event that there is a need to return the bill to text previously agreed to.*

**Rep. Frank (D-MA)** may offer a manager's amendment (#3) on February 28, 2007. The amendment clarifies that any risk based analysis performed as part of mitigation agreements is performed by CFIUS. The amendment clarifies that, in addition to Financial Services, Energy and Commerce, and Foreign Affairs, CFIUS will be required to report to other committees having jurisdiction over any aspect of the transaction. It also clarifies that "periodic" reports by individual agencies to CFIUS shall not be less than every 6 months. It requires CFIUS to develop methods for assessing companies' compliance with terms of mitigation agreements. The amendment requires that the annual report include a discussion of the compliance methods. It makes the one-time report on the Israel boycott an annual report. The amendment re-inserts the Inspector General's report that was struck during the Financial Services Committee markup.

**Rep. King (IA)** may offer an amendment (#4) on February 28, 2007. The amendment adds the following factor to be considered when reviewing or investigating a covered transaction: the potential effects of the covered transaction on the efforts of the United States to curtail human smuggling [defines human smuggling as any act constituting a violation of section 274(a) of the Immigration and Nationality Act] and drug smuggling in any country that is not described in paragraphs (1) and (2) of section 1003(a) of the Controlled Substances Import and Export Act.

**Rep. McCaul (R-TX)** may offer an amendment (#5) on February 28, 2007. The amendment requires the President to include in the annual report a detailed discussion of factors, including the effective rate of taxation on entrepreneurs and businesses and other sources of capital in the United States as compared to other countries, that affect the

number of filings, changes in the types of business sectors involved in filings, and changes in the number of investments originating from specific countries.

**Rep. McCaul (R-TX)** may offer an amendment (#6) on February 28, 2007. The amendment requires the President to include in the annual report a detailed discussion of factors, including the amount of burdensome regulation in the United States as compared to other countries, that affect the number of filings, changes in the types of business sectors involved in filings, and changes in the number of investments originating from specific countries.

**Rep. McCaul (R-TX)** may offer an amendment (#7) on February 28, 2007. The amendment requires the President to include in the annual report a detailed discussion of factors, including trend information on the number of jobs in the United States related to foreign investment resulting from covered transactions, that affect the number of filings, changes in the types of business sectors involved in filings, and changes in the number of investments originating from specific countries.

**Rep. Davis (R-KY)** may offer an amendment (#8) on February 28, 2007. The amendment removes “in a roll call vote” from the CFIUS approval process of reviews and investigations. Current bill language requires the approval by a majority of members of CFIUS “in a roll call vote.”

**Rep. Davis (R-KY)** may offer an amendment (#9) on February 28, 2007. The amendment replaces “Under Secretary” with an “appropriate Senate confirmed official” as someone that may be delegated the authority to sign the results of a review or investigation on behalf of the Secretary of the Treasury, the Secretary of Commerce or the Secretary of Homeland Security. Current bill language allows for the delegation of that authority to “an appropriate Under Secretary.”

**Rep. Davis (R-KY)** may offer an amendment (#10) on February 28, 2007. The amendment removes the requirement to include information about roll call votes by the CFIUS as part of the annual report to Congress.

**Rep. Barrow (D-GA)** may offer an amendment (#11) on February 28, 2007. The amendment: would require the chairperson of CFIUS to notify Congress upon receipt of written notice of a proposed covered transaction (within 5 days), would require the Chairperson of CFIUS to notify Congress upon commencing and completing an investigation (not later than 1 day upon commencing the investigation) as well as providing timely responses to Congressional inquiries about the investigation. Additionally, the amendment outlines the Members of Congress that are provided with the above information.

**Rep. Barrow (D-GA)** may offer an amendment (#12) on February 28, 2007. The amendment would add to the list CFIUS must provide reports on completed committee investigations: “Senators representing States and Members of congress representing congressional districts that would be significantly affected by the covered transaction.”

